

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROGER LENK, )  
Plaintiff, ) NO. CV-10-5018-LRS  
-vs- )  
LIFE INSURANCE COMPANY OF NORTH ) **ORDER GRANTING DEFENDANTS'**  
AMERICA, a foreign corporation, ) **MOTION FOR PARTIAL SUMMARY**  
et al., ) **JUDGMENT**  
Defendants. )  
)

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BEFORE THE COURT is Defendant Life Insurance Company of North America's ("LINA") and CIGNA Group Insurance's Motion for Partial Summary Judgment, Ct. Rec. 20, filed on October 5, 2010. The motion was considered without oral argument.

**I. BACKGROUND**

This is a case arising out of Defendant LINA's denial of plaintiff's claim for disability insurance benefits. Plaintiff asserts causes of action for violation of the Insurance Fair Conduct Act ("IFCA"), breach of contract, bad faith, equitable relief, violation of the Washington Consumer Protection Act ("CPA"), and "Recovery of LTD Benefits and other losses subsequently suffered".

1 Plaintiff Roger Lenk made a claim for disability benefits to LINA  
2 dated September 27, 2004. Thereafter, LINA approved plaintiff's claim by  
3 letter dated November 19, 2004, and he received disability benefits for  
4 a period of time. Subsequently, LINA denied plaintiff's claim for further  
5 disability benefits by letter dated January 18, 2006. Plaintiff then  
6 pursued an administrative appeal, and LINA reaffirmed its denial by  
7 letter dated June 1, 2006. Thereafter, plaintiff pursued another  
8 administrative appeal, and LINA again reaffirmed its denial by letter  
9 dated December 11, 2006.

10 On November 29, 2006, plaintiff filed suit against LINA in  
11 Franklin County Superior Court (the "original lawsuit"), asserting that  
12 LINA improperly denied his claim for benefits. Among other things,  
13 plaintiff asserted that LINA "failed to act in good faith." Furthermore,  
14 plaintiff explicitly set forth a claim for "insurance bad faith." On  
15 January 16, 2007, the original lawsuit was removed to the United States  
16 District Court for the Eastern District of Washington. On June 10, 2008,  
17 the original lawsuit was dismissed.

18 Plaintiff then filed the current lawsuit against LINA in Franklin  
19 County Superior Court on December 8, 2009. On February 19, 2010, the  
20 current lawsuit was removed to this Court. With this motion, LINA now  
21 seeks partial summary judgment based on the following contentions:

22 1. Plaintiff's IFCA claim is barred, because the initial denial,  
23 and all subsequent denials, occurred prior to the statute's effective  
24 date of December 6, 2007.

1       2. Plaintiff's claims for bad faith, equitable relief, and  
2 "recovery of LTD benefits and other losses suffered" are barred pursuant  
3 to the applicable statute of limitations and/or based on duplicity with  
4 respect to other claims.

5       3. Plaintiff's damages claims for personal injury, including his  
6 claims for emotional distress damages should be dismissed based on  
7 plaintiff's admission that he has not sustained any emotional distress  
8 damages and the unavailability of such damages in breach of contract and  
9 CPA cases.

10      **II. ANALYSIS**

11      **A. IFCA Claim**

13       Defendants assert that IFCA does not operate retroactively so as to  
14 permit plaintiff's cause of action. Defendants explain, citing *Malbco  
15 Holdings, LLC v. AMCO Insurance Co.*, 546 F. Supp. 2d 1130, 1133 (E.D.  
16 Wash. 2008) that "[t]he Washington Legislature has not expressed an  
17 intent to apply the IFCA retroactively, and indeed the statute is  
18 worded in present and future tenses." Id. As a result, Defendants argue,  
19 federal courts in Washington state have unanimously refused to apply the  
20 IFCA retroactively. In conclusion, Defendants state that all denials of  
21 plaintiff's claim had occurred by December 11, 2006 - well before IFCA's  
22 effective date of December 6, 2007. Defendants urge the Court to dismiss  
23 Plaintiff's IFCA claim because IFCA does not apply retroactively to those  
24 denials.

26       Plaintiff responds that his IFCA cause of action is based on the

1 assertion that LINA's denial of his claim has "continued" beyond the  
2 effective date of the statute. The Court disagrees with Plaintiff's  
3 theory as the courts interpreting this issue have held that pre-IFCA  
4 enactment conduct cannot form the basis of a present and/or continuing  
5 IFCA violation. The *Malbco* court did not accept plaintiff's argument  
6 that its resubmission of its claims and subsequent wrongful denial of  
7 coverage after the IFCA was approved and enacted was a new and continuing  
8 violation. In *Rinehart v. Life Insurance Company of North America*, 2009  
9 WL 529524, \*1 (W.D. Wash. 2009), the District Court for the Western  
10 District of Washington recently confirmed that, even where an insurer  
11 affirmatively denies an insured's appeal after IFCA's effective date, the  
12 statute still does not apply so long as the initial denial occurred prior  
13 to the effective date of the statute.

14  
15 The Court finds the undisputed facts indicate that plaintiff's  
16 claim for disability benefits was initially denied by letter dated  
17 January 18, 2006. Thereafter, plaintiff's final appeal was denied by  
18 letter dated December 11, 2006. Consequently, the "precipitating event,"  
19 along with all subsequent denials, occurred prior to the December 6, 2007  
20 effective date of IFCA. Plaintiff's IFCA claim is hereby respectfully  
21 dismissed.

22       **B. Breach of Fiduciary Duty and Negligence (Bad Faith) Claim**

23  
24 Defendants contend that plaintiff failed to file suit within three  
25 years of the date his disability benefits were denied. As a result,  
26 Defendant LINA asserts Plaintiff's claim for bad faith denial of benefits

1 is barred by the statute of limitations. Defendants explain that a cause  
2 of action for bad faith is a tort subject to a three year statute of  
3 limitations. RCW 4.16.080(2). Defendants conclude that Plaintiff's bad  
4 faith cause of action accrued, and the statute of limitations commenced,  
5 when his claim was initially denied by letter dated January 18, 2006.

6 Plaintiff urges that "[a] much fairer approach would make the date  
7 the insured receives the final denial in writing the date both contract  
8 and tort statutes accrue." Ct. Rec. 25 at 9. Plaintiff states that  
9 December 11, 2006 is the date that triggers the statute of limitations  
10 in this case, which is well within the three years of the lawsuit filing  
11 date, assuming that the insured received the letter the same day it is  
12 dated. Finally, Plaintiff states that Washington has the doctrine of  
13 continuing tort and has determined that the date of accrual for a  
14 continuing tort arises from the date of the last tortious act. *Caughell*  
15 v. Group Health Cooperative, 124 Wn.2d 217, 233-239 (1994).

17 The Court agrees with Defendants and finds that Plaintiff's cause  
18 of action against his insurer accrued at the time his claim for coverage  
19 was denied. Here, Plaintiff's claim for benefits was denied by Defendant  
20 LINA's January 18, 2006 denial letter. LR 56.1 Fact Stmt., ¶ 8. The  
21 letter specifically states, "[W]e are unable to continue paying benefits  
22 beyond January 16, 2006." *Id.* The letter also states, "Your claim is now  
23 closed, and no further benefits are payable." *Id.* Furthermore, it is  
24 undisputed by Plaintiff that his claim was denied pursuant to this  
25

1 letter.<sup>1</sup> Therefore, Plaintiff's bad faith claim is hereby dismissed as  
 2 being barred by the applicable statute of limitations.

3       **C. Equitable Relief Claim**

4       Plaintiff's cause of action for equitable relief seeks an order  
 5 "requiring that his past and future LTD benefits be paid starting from  
 6 January 16, 2006 forward." LR 56.1 Fact Stmt., ¶ 16, citing Complaint,  
 7 Third Cause of Action, at ¶129. He further seeks to enjoin LINA from  
 8 "terminating LTD benefits" in the future. *Id.* Plaintiff's cause of  
 9 action for equitable relief appears to be based on an alleged breach of  
 10 the insurance policy contract.

12       Defendants argue that plaintiff cannot establish he is entitled to  
 13 such extraordinary relief or that the remedy at law is inadequate.  
 14 Defendants cite *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172  
 15 (2006) for the premise that "[i]t is a well-established rule that an  
 16 equitable remedy is an extraordinary, not ordinary form of relief."

17       Defendants also argue that plaintiff's equitable claim is merely  
 18 duplicative of his breach of contract claims, the latter claims which are  
 19 not subject to Defendants' motion for partial summary judgment. Finally,  
 20 Defendants argue that to the extent plaintiff's cause of action for  
 21 equitable relief is not a mere breach of contract action, it is barred

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23  
 24       <sup>1</sup>The Court notes that Plaintiff's original lawsuit was filed on  
 25 November 29, 2006. Therein, Plaintiff asserted that LINA had "failed to  
 26 act in good faith." Furthermore, the original lawsuit explicitly set  
 forth a claim for "insurance bad faith." Thus, by the time the original  
 lawsuit was filed, Plaintiff clearly understood that he had a purported  
 basis for a bad faith claim against Defendant LINA.

1 by the applicable statute of limitations. Defendants explain that  
2 although it is not entirely clear, it would appear to be a claim for  
3 "taking" or "injuring" personal property. As such, this equitable relief  
4 claim is subject to Washington's three year statute of limitations  
5 pursuant to RCW 4.16.080.

6 Defendants further argue to the extent that this claim is  
7 characterized as something other than a contract claim or a property  
8 damage claim, it is subject to Washington's two year "catch-all" statute  
9 of limitations pursuant to RCW 4.16.130.

10 The Court agrees with Defendants. As discussed above, plaintiff's  
11 causes of action accrued when his claim was initially denied and closed  
12 by LINA's letter dated January 18, 2006. Plaintiff did not file the  
13 current lawsuit until December 8, 2009 - 3 years and 11 months later.  
14 Furthermore, the current lawsuit was filed more than three years after  
15 the original lawsuit was filed on November 29, 2006 - at which point  
16 Plaintiff clearly understood that he had a purported basis for a claim  
17 against Defendant LINA. Regardless of whether a two year or three year  
18 statute of limitations applies, plaintiff's claim is time barred.  
19 Plaintiff's cause of action for equitable relief is hereby respectfully  
20 dismissed.

21 **D. Long-Term Disability Benefits and Other Losses Claim**

22 Plaintiff asserts a cause of action for "Recovery of LTD Benefits  
23 and other losses subsequently suffered." Defendants argue that this is  
24 also a breach of contract action claim in disguise. As such, Defendants  
25

1 request that this cause of action be dismissed based on duplicity.  
2 Additionally, Defendants argue that to the extent that this claim is not  
3 just another breach of contract claim, it too is barred by the applicable  
4 statute of limitation, regardless of whether the two year statute of RCW  
5 4.16.130 applies, or the three year statute of RCW 4.16.080 applies.  
6 More than three years have passed between the time plaintiff's claims  
7 accrued on January 18, 2006, and the time the current lawsuit was filed  
8 on December 8, 2009. The Court finds that this claim is duplicative of  
9 plaintiff's breach of contract claim, but to the extent it is not a  
10 breach of contract claim, it is barred by the applicable statute of  
11 limitations under both RCW 4.16.130 and/or RCW 4.16.080.  
12

13       **E. Damages Claims For Personal Injury and Emotional Distress**

14       Defendants urge the Court to dismiss plaintiff's damages claims  
15 based on plaintiff's admissions during discovery. Plaintiff has reported  
16 in interrogatory answers that he has not sustained any emotional distress  
17 damages. Defendants argue that there is no evidence that plaintiff has  
18 sustained any other form of personal injury damages as a result of acts  
19 attributable to defendants. Because plaintiff has no viable causes of  
20 action that would allow him to recover for emotional distress, or any  
21 other form of personal injury, Defendants request that these components  
22 of his damages claim should be dismissed. The Court finds that  
23 plaintiff's causes of action for breach of contract and violation of CPA  
24 (which remain in this case) do not allow for an award of emotional  
25 distress damages, or any other form of personal injury damages. See

1     *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 440-48, 815 P.2d  
2     1362 (1991); *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366,  
3     369-370, 770 P.2d 671 (1989). Consequently, plaintiff has no viable  
4     causes of action remaining that allow for the recovery of emotional  
5     distress damages, or any other form of personal injury damages. These  
6     components of plaintiff's damages claims are hereby dismissed as  
7     requested by Defendants.

8                 **IT IS ORDERED:**

9                 1. Defendants' Motion for Partial Summary Judgment, **Ct. Rec. 20**,  
10     is **GRANTED**.

12                 2. Plaintiff's First Cause of Action for "Recovery of LTD Benefits  
13     and other losses subsequently suffered" is **DISMISSED WITH PREJUDICE**.

14                 3. Plaintiff's Second Cause of Action for "Breach of Fiduciary Duty  
15     and Negligence" is **DISMISSED WITH PREJUDICE**.

16                 4. Plaintiff's Third Cause of Action for "Equitable Relief" is  
17     **DISMISSED WITH PREJUDICE**.

18                 5. Plaintiff's Fourth Cause of Action for "Unreasonable Claims  
19     Denial under RCW 48.30, The Insurance Fair Conduct Act (IFCA)" is  
20     **DISMISSED WITH PREJUDICE**.

22                 6. Plaintiff's damages claims for personal injuries, including, but  
23     not limited to, his claims for emotional distress damages, are **DISMISSED**  
24     **WITH PREJUDICE**.

25                 7. Plaintiff's Breach of Contract and Washington Consumer  
26     Protection Act claims remain in this case.

The District Court Executive is directed to file this Order and provide copies to counsel.

**DATED** this 13th day of December, 2010.

*s/Lonny R. Suko*

LONNY R. SUKO  
CHIEF UNITED STATES DISTRICT JUDGE